

***United States Court of Appeals
for the Second Circuit***



APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

17/10/17
2055

-----x
UNITED STATES OF AMERICA,

-against-

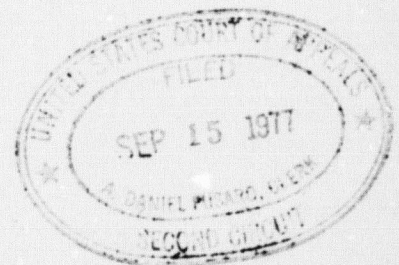
Docket Nos. 77-1017
77-2055

PHILIP FLOYD TOLLIVER,

Defendant-Appellant.
-----x

B
PBS

APPENDIX
FOR
APPELLANT



HELENA PICHEL SOLLEDER
19 RECTOR STREET
NEW YORK, N. Y. 10006
TEL. BO 9-2222

PAGINATION AS IN ORIGINAL COPY

INDEX

Docket Entries
Judgment of Conviction
Indictment
The Charge
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Decision of Court " "
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6 CR 472-1		DOOLING, J.
GE/MAGISTRATE Accepted 0713 (Disp./Sentence)	U.S. vs. PHILIP FLOYD DILLIVER (LAST, FIRST, MIDDLE)	Case Filed Mo. 7 Day 23 No. of Days 2 U.S. MAG. CASE NO. 76 M 1493
DISTRICT 1 Office	OFFENSES CHARGED 1b.2113(a)(d)-2 & 371 Did conspire to bank robbery and did use a dangerous weapon.	ORIGINAL COUNTS 3 SUPERSEDING COUNTS
II. KEY DATES & INTERVALS		RELEASE <input type="checkbox"/> AMI <input type="checkbox"/> Fugitive <input type="checkbox"/> Denied <input type="checkbox"/> Set <input type="checkbox"/> Pers. Recog. <input type="checkbox"/> PSA \$ 50,000 conditions <input type="checkbox"/> Date <input type="checkbox"/> 10% Deposit <input checked="" type="checkbox"/> Surety Bond <input type="checkbox"/> Bail Not Made <input type="checkbox"/> Collateral <input type="checkbox"/> Status Changed (See Docket) <input type="checkbox"/> 3rd <input type="checkbox"/> Other
ARREST or U.S. Custody Began Summons Served First Appearance 7-20-76	INDICTMENT X Information 7/23/76 Indict. Waived In Charging District	ARRAIGNMENT 8/2/76 Trial Set For 9/28/76 Verdict Due 10/5/76
MAGISTRATE DATE 7-20-76 INITIAL/NO ASC/07B OFFENSE (In Complaint) Bank Robbery. T-18 USC Section 2113(a) and (d).		TRIAL Outcome: <input type="checkbox"/> DISMISSED <input type="checkbox"/> HELD FOR OTHER PROCEEDING IN DISTRICT <input type="checkbox"/> HELD FOR OTHER PROCEEDING IN DISTRICT BELOW

U.S. Attorney or Asst.

Lee Adlerstein

ATTORNEYS **XX**
Layton & Sherman
50 Rockefeller Plaza, NYC.
Legal Aid Society Court assigned counsel:

BILL CROFT 2		EXCLUDABLE DELAY (a) (b) (c) (d)
DATE	PROCEEDINGS	
	Indictment Filed - See 76 CR 472	
7/23/76	Before NEAHER, J. - Indictment filed.	
8/3/76	Memo sent to all counsel stating that the trial will commence on Monday, August 23, 1976. Returned to chambers as requested.	
8/2/76	Before DOOLING, J. - Case called. Deft & Counsel present. Deft waives reading of the indictment. Deft pleads not guilty. Deft moves to reduce bail. Motion granted. Deft released under 3146(a)(1) & (3) to the custody of Pre-Trial Services upon execution of a personal appearance bond in the amount of \$5,000 secured by \$500 deposit. Trial date set week of August 23.	
8-18-76	Memorandum to all counsel filed setting case for trial on 9-27-76 (received from Chambers)	
8-16-76	Before DOOLING, J. - Case called. Deft & Counsel present. Deft moves for the disclosure of the name of a witness. Motion denied. Trial adj'd to week of	

A



Petition for Writ of Habeas Corpus Ad Prosequendum issued.

Before DOOLING J - case called - deft & counsel present - hearing ordered and begun on motion to suppress identification, etc. hearing contd to 9-28-76.

Motion to suppress line-up identification filed (rec'd from Chambers)

BY DOOLING, J. - Order filed (dated 9-20-76) that deft be returned to

Warden, MCC, NY, upon completion of line-up etc. Order ret'd and filed - executed.

Writ ret'd and filed - executed.

Before DOOLING J - case called - deft & counsel present - hearing resumed - Govt rests - Both sides rest - hearing concluded - motion to suppress is denied - Defts move for a severance - motion denied - trial ordered and BEGUN - Jurors selected and sworn - trial contd to 9-29-76. Bail exonerated as to deft Tolliver.

Before DOOLING, J. - Case called. Deft & Counsel present. Trial resumed. Govt opens. Trial continued to 9/30/76.

By DOOLING, J. - Order releasing bail filed.

Before DOOLING, J. - Case called - Deft and counsel present - Trial resumed - Gov't rests - Deft's motion for dismissal argued - Motion denied - Trial cont'd to 10-1-76.

Before DOOLING, J. - Case called - Deft and counsel present - Trial resumed - Both sides rest - Motion to dismiss renewed - Motion denied - Both sides sum up - Judge charges Jury - Marshals sworn - Alternates discharged - Jury retires to deliberate - Deliberations cont'd to 10-5-76.

By DOOLING, J. - Order of sustenance filed.

Before DOOLING, J. - Case called - Deft Tolliver and counsel present - Jury deliberations resumed - Jury returns with verdict of guilty on cts 1 and 3 and not guilty on ct 2 - Jury polled - Trial concluded - Jury discharged - Deft to be released upon execution of \$25,000.00 PRB secured by \$500.00 cash and report to pre-trial services Monday and Friday of every week - Case adjd w/o date for sentence.

By DOOLING, J. - Order of sustenance filed.

Stenographic transcripts dated 9-27-76; 9-28-76; 9-29-76 and 9-30-76 filed.

Stenographers transcripts dated 10/1/76 and 10/5/76 filed.

By CRREIN, J. - Order for acceptance of bail filed.

By Dooling, J. - Writ Issued.

Before DOOLING, J. - Case called. Deft & Counsel present. deft sentenced for 10 years imprisonment on count 1 and five years on count 3, pursuant to T-18, U.S.C. Section 4205 (b)(2) to

DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DE		
		(a)	(b)	(c)
	(Document No.) become eligible for parole at such time as the Parole Commission may determine, the sentences to run concurrently with each other and consecutively to the sentence imposed in this Court on July 7, 1967. Personal appearance Bond is exonerated and the deft is remanded. Deft advised of his right to appeal. Clerk directed to file forthwith without payment of fee a notice of appeal on behalf of the deft. Judgment & Commitment filed. Certified copies to Marshals and Probation.			
12/17/76	Notice of Appeal filed.			
12/17/76	XX Docket entries and duplicate of Notice of Appeal mailed to the C of A.			
12-20-76	Copy of order releasing bail filed.			
12-23-76	Writ of Habeas Corpus return and filed. - Executed.			
1-5-77	Certified Copy of Judgment and Commitment returned and filed from Marshal. Satisfied writ and copies of judgment and commitment to M.C.C., New York 1-5-77.			
1-5-77	By Dooling Order filed for Authorization for Expert Services.			
1.21.77	Order filed received from the Court of Appeals that the record be docketed on or before February 14, 1977, in default of which the appeal shall be dismissed forthwith.			
2-3-77	Two stenographers transcripts filed (one dated Dec. 17, 1976 and one dated Aug. 16, 1976)			
2-3-77	Voucher for compensation filed and forwarded to Admin. Office for payment.			
2-7-77	Voucher for compensation for expert services filed and forwarded to Admin. Office for payment.			
2/9/77	Retired on Appeal certified and hand delivered to the C of A by Joan Gill.			
2-9-77	Stenographers transcript filed dated 8-2-76			
3-25-77	Acknowledgment received from the c of A for receipt of index to record on appeal and filed.			
3/28/77	Notice of motion filed pursuant to T-28, U.S.C. 2255 for vacation of sentence and forwarded to chambers. (see 77 C 607)			
4/1/77	By DOOLINGJ. - Writ issued.			
4/7/77	Before DOOLING, J - Case called. Hearing held proposed witness Billy Croft advised of his rights. Hearing concluded.			
4/8/77	By DOOLING, J - Appointment of counsel filed. (voucher) *LAYTON and SHERMAN 50 Rockefeller Plaza New York NY 10020 586 4300.			
4-11-77	Memorandum of Law filed in opposition to defts motion pursuant to 28:2255			
4.12.77	Certified Copy of Writ of Habeas Corpus Ad Prosequendum returned and filed from Marshal. Executed.			
4-14-77	Before DOOLING J - case called - hearing ordered and begun - Billy Croft waives atty client privilege. Billy Croft sworn as a witness for the plaintiff. Petitioner Tolliver waives			

CRIMINAL DOCKET

DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DELA			
		(a)	(b)	(c)	(d)
	atty client privilege - both sides rest - trial concluded- decision reserved.				
4.20.77	By Dooling, J.- Memorandum and Order filed that petitioner's motion under Title 28, U.S.C., Section 2255 for relief against the judgment of conviction entered 12.17.76, is in all respects denied. (relating # 77 C 607)				
4-21-77	Judgment filed dated April 21, 1977 By Dooling, J. Order dtd 4/21/77 that petitioner take nothing of the respondent and that the motion under 28:2255 is denied.				
4-29-77	Notice of appeal filed (from 28:2255 denial of motion etc.) Docket entries and duplicate of Notice mailed to the Court of Appeals.				
5-6-77	Letter filed dated April 17, 1977, received from Chambers re sentence imposed, etc.				
5/13/77	By Dooling, J Order dtd 5/12/77 filed re recommendation that the application of Daniel Brooks be allowed.jlj				
5/13/77	Voucher for compensation filed w/affidavit and order by Dooling, J and forward to administrative office for payment.jlj				
6-7-77	Voucher for compensation of counsel filed forwarded for payment.				
8/8/77	Index to supplemental record on appeal filed. and Hand delivered delivered by Helena Solleder to C f of A by Helena Solleder.jlj				
8-17-77	2 transcripts filed (one dated 4-7-77 and one dated 4-13-77)				

AO-257

Interval
(per Section II)Start Date
End DateLtr. Total
Code Days

A

DEFENDANT

PHILLIP FLOYD TOLLIVER

DOCKET NO.

76 CR 472

JUDGMENT AND PROBATION/COMMITMENT ORDER

AO 245 (8/74)

COUNSEL

In the presence of the attorney for the government
the defendant appeared in person on this date

MONTH DAY YEAR

DECEMBER 17, 1976

☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL

Marion Seltzer, Esq.

(Name of counsel)

PLEA

☐ GUILTY, and the court being satisfied that
there is a factual basis for the plea,☐ NOLO CONTENDERE,☐ NOT GUILTYFINDING &
JUDGMENT

There being a finding/verdict of

☐ NOT GUILTY. Defendant is discharged☒ GUILTY. counts 1 and 3

Defendant has been convicted as charged of the offense(s) of violating Title 18, U.S.C. Sections 2113(a), 2, and 371 in that on or about July 20, 1976, the defendant with others did knowingly and wilfully, by force violence and intimidation, did take from the person and presence of employees of the Marine Midland Tinker National Bank, East Farmingdale, New York, approximately \$17,216. in United States currency, which money was in the care, custody, control management and possession of the said Marine Midland Tinker National Bank, the deposits of which bank were then and there insured by the Federal Deposit Insurance Corporation. The defendant did combine, conspire and agree together with others to commit the said offense.

SENTENCE
OR
PROBATION
ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ten (10) years on count one (1) and five (5) years on count three (3), pursuant to T-18, U.S.C., Section 4205(b)(2) to become eligible for parole at such time as the Parole Commission may determine, the sentences to run concurrently with each other and consecutively to the sentence imposed in this court on July seventh, 1967. Personal appearance Bond is exonerated and the defendant is remanded.

SPECIAL
CONDITIONS
OF
PROBATION

FILED

U. S. CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.

★ DEC 17 1976 ★

TIME A.M. _____

P.M. _____

ADDITIONAL
CONDITIONS
OF
PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends,

COMMITMENT
RECOMMEN-
DATION☒ U.S. District Judge☐ U.S. Magistrate

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

Date

12/20/76

B

18

TRP:LAA:sj
F# 763,010

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X

UNITED STATES OF AMERICA

- against -

PHILLIP FLOYD TOLLIVER and
BILL CROFT,

Defendants.

----- X

THE GRAND JURY CHARGES:

COUNT ONE

On or about the 20th day of July 1976, within the Eastern District of New York, the defendants PHILLIP FLOYD TOLLIVER and BILL CROFT knowingly and wilfully, by force, violence and intimidation, did take from the person and presence of employees of the Marine Midland Tinker National Bank, 1995 New Highway, East Farmingdale, New York approximately Seventeen Thousand Two Hundred and Sixteen Dollars (\$17,216.00) in United States currency, which money was in the care, custody, control, management and possession of the said Marine Midland Tinker National Bank, the deposits of which bank were then and there insured by the Federal Deposit Insurance Corporation. (Title 18, United States Code, Section 2113(a) and Section 2.)

COUNT TWO

On or about the 20th day of July 1976, within the Eastern District of New York, the defendants PHILLIP FLOYD TOLLIVER and BILL CROFT knowingly and wilfully, by force, violence, and intimidation, did take from the person and presence of employees of the Marine Midland Tinker National Bank, 1995 New Highway, East Farmingdale, New York approximately Seventeen Thousand Two Hundred and Sixteen Dollars (\$17,216.00) in United

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.

JUL 23 1976

TIME A.M.
P.M.

Cr. No.
(T. 18, U.S.C., §2113(a),
§2113(d) and §2 and §371)

76 CR 472

States currency, which money was in the care, custody, control, management and possession of the said Marine Midland Tinker National Bank, the deposits of which bank were then and there insured by the Federal Deposit Insurance Corporation and in commission of this act and offense the defendants PHILLIP FLOYD TOLLIVER and BILL CROFT did assault and place in jeopardy the lives of the said bank employees, as well as the lives of other persons present by the use of a dangerous weapon. (Title 18, United States Code, Section 2113(d) and Section 2.)

COUNT THREE

On or about the 20th day of July 1976, within the Eastern District of New York, the defendants PHILLIP FLOYD TOLLIVER and BILL CROFT did combine, conspire, confederate and agree together to commit an offense against the United States in violation of Title 18, United States Code, Sections 2113(a), 2113(d) and 2 by conspiring to rob, by force, violence and intimidation, and with a dangerous weapon, the Marine Midland Tinker National Bank, 1995 New Highway, East Farmingdale, New York, the deposits of which bank were then and there insured by the Federal Deposit Insurance Corporation.

In furtherance of the said conspiracy and in order to effectuate the purposes thereof, there was committed the following

O V E R T A C T

1. On or about the 20th day of July 1976, within the Eastern District of New York, the defendants PHILLIP FLOYD TOLLIVER and BILL CROFT rode together in a white 1973 Cadillac, bearing New York license plate number 180 BMR.
(Title 18, United States Code, Section 371.)

A TRUE BILL.

Nicholas D. Elia
FOREMAN.

David D. Fagan
UNITED STATES ATTORNEY
Eastern District of New York

No. _____

UNITED STATES DISTRICT COURT

EASTERN District of NEW YORK

Division

THE UNITED STATES OF AMERICA

vs.

**PHILLIP FLOYD TOLLIVER and
BILL CROFT,
Defendants.**

INDICTMENT

(T. 18, U.S.C., §§2113(a), 2113(d),
371 and 2)

A true bill,

Foreman.

**Filed in open court this _____ day
of _____, A. D. 19____**

Clerk.

Bail, \$ _____

**Lee Alan Adlerstein GPO 902-482
330-7053**

3 1 the least exposed. The question is, is that plan
2 of his not to be exposed? Is that plan of his to be
3 outside the bank a distance away in his own car? Is
4 that plan going to succeed in this courtroom? You
5 have heard the evidence. Please evaluate it and use
6 your logic and good common sense. Thank you very
7 much.

8 THE COURT: We will have a short recess, ladies
9 and gentlemen, then we will have the law in the case.

10 Please do not discuss the case with one another
11 or anyone not on the Jury, until it is given to you
12 to decide.

13 (Jury leaves the courtroom.)

14 THE COURT: You want page 60?

15 MR. SELTZER: Yes, Your Honor.

16 THE COURT: I will put it in between the middle
17 of page 51, all right?

18 MR. SELTZER: Thank you very much.

19 (Recess taken.)

20 THE COURT: Members of the Jury: You have heard
21 the arguments of counsel and the evidence in the
22 case and now must receive the instructions on the
23 law that governs the case. You, the jurors, are the
24 sole judges of the facts. You must, however, follow
25 the law as given to you in these instructions, and

D

4 1 apply it to the facts as you find them from the
2 evidence before you. You are not free, nor am I,
3 to substitute private judgments as to what the law
4 should be for what the law in fact is.

5 You have been sworn as jurors well and truly to
6 try this case and to render a true verdict. You must
7 therefore exclude from your deliberations all bias
8 and prejudice. You must not permit yourselves to be
9 governed by sympathy or any other consideration not
10 founded in the evidence and these instructions on the
11 law. The issues of fact to be tried are those made
12 by the indictment and the defendant's plea of not
13 guilty. Bear in mind that the indictment is the formal
14 method of accusing a person of crime; it is not itself
15 evidence that a defendant committed the crime, nor
16 is it the fact that the indictment was found any evidence
17 of guilt.

18 As you know, only the case of Mr. Tolliver is
19 presented to you for decision. You must, however,
20 in passing on the charges against Mr. Tolliver first
21 determine in considering the first two counts, whether ✓
22 the bank robbery described in those counts was committed
23 by Croft and another man, for if you conclude that
24 Mr. Croft did not participate in that bank robbery,
25 then you cannot find Mr. Tolliver guilty on Count one

5 1 or Count two, for in substance, he is charged with
2 aiding and abetting Mr. Croft in the bank robbery.
3 Similarly, in passing on Count three, you must determine
4 whether or not Mr. Tolliver and Mr. Croft conspired
5 with each other.

6 The indictment is in three counts and all
7 three relate to the same incident. The first two
8 counts differ from each other in that in the first
9 count the defendants are charged with the use of
10 force, violence and intimidation, in taking from the
11 employees of the bank, money in the bank's custody or
12 possession, whereas Count two charges that in so
13 doing, the defendants assaulted and placed in jeopardy
14 the lives of the bank employees and other persons
15 present by the use of a dangerous weapon. The third
16 count charges the defendants with conspiring to commit
17 the bank robbery. You must consider each count separa-
18 tely and bring in a separate verdict on each count.

19 Count one is drawn under subdivision (a) of
20 Section 2113 of Title 18 of the United States Code,
21 which provides, so far as is here relevant:

22 "Whoever, by force and violence, or by intima-
23 tion, takes from the person or presence of another,
24 any money in the care, custody, control, management
25 or possession of any bank, shall be fined or imprisoned

61 or both.

2 Count one of the indictment, drawn under subdivis-
3 ion (a) of Section 2113 reads in the following terms:

4 "On or about the 20th day of July, within the
5 Eastern District of New York, the defendants Philip
6 Floyd Tolliver and Bill Croft, knowingly and wilfully
7 by force, violence and intimidation, did take from the
8 person and presence of employees of the Marine Midland
9 Tinker National Bank 1995 New Highway, East Farmingdale,
10 New York, approximately \$17,216.00 in United States
11 currency, which money was in the care, custody, control,
12 management and possession of the said Marine Midland
13 Tinker National Bank, the deposits of which were then
14 and there insured by the Federal Deposit Insurance
15 Corporation."

16 Count two is drawn under Section 2113(d), which
17 in relevant part provides:

18 "Whoever in committing any offense defined in
19 subsection (a), the section which I read to you just
20 earlier, of this section, assaults any person, or
21 puts in jeopardy the life of any person by the use of
22 a dangerous weapon, shall be fined or imprisoned, or
23 both."

24 Count two in its first part is exactly like
25 Count one and it is in its closing part that it adds.

7 1 the new element about assault and putting life in
2 jeopardy by the use of a dangerous weapon.

3 Count two reads as follows:

4 "On or about the 20th day of July, 1976,
5 within the Eastern District of New York, the defendants
6 Philip Floyd Tolliver and Bill Croft, knowingly and
7 wilfully by force, violence and intimidation, did
8 take from the person and presence of employees of the
9 Marine Midland Tinker National Bank, 1995 New Highway,
10 East Farmingdale, New York, approximately \$17,216.00
11 in United States currency, which money was in the
12 care, custody, control, management and possession of
13 the said Marine Midland Tinker National Bank, the
14 deposits of which bank were then and there insured by
15 the Federal Deposit Insurance Corporation."

16 So far it is just exactly the same as Count one.

17 "And in the commission of this act and offense,
18 the defendants Philip Floyd Tolliver and Bill Croft,
19 did assault and place in jeopardy the lives of the said
20 bank employees, as well as the lives of other persons
21 present, by the use of a dangerous weapon."

22 In each count and in the statute the word
23 "bank" means any bank, the deposits of which are
24 insured by the Federal Deposit Insurance Corporation.

25 It is not denied that the deposits of the Marine

8 1 Midland Tinker National Bank were insured by the
2 Federal Deposit Insurance Corporation. The certificate
3 establishes that fact has been received in evidence.

4 I have said that you must consider each count
5 separately. You will have noticed when I read
6 Counts one and two to you, both defendants are charged
7 in each count with taking the money from the bank.
8 Where, as here, two persons are charged together
9 with committing a crime. The Government does not
10 have to prove that each defendant alone and unaided
11 did all the acts, making up the crime. The Government
12 must, however, show that the defendants between
13 them and acting together did all the acts making up
14 the offense and each defendant actively participated
15 in the venture, that he intentionally joined his co-
16 defendant in the venture, knowing the nature of it,
17 and that he sought to make the venture succeed.
18 This is because under Section II of Title 18 of
19 the United States Code, anyone who aids or abets
20 the commission of an offense is punishable as a
21 principal.

22 (continued next page)
23
24
25

T3R2

Charge

1
2 The essential elements of Count one of the
3 indictment, all of which the Government ^{must} ~~is~~ approved
4 beyond a reasonable doubt or else you must acquit
5 the defendant on Count one, are the following:

6 First, that the defendant Croft and another
7 man took money from the bank employees or from their
8 presence;

9 Two, that the money, when the defendant Croft
10 and the other man took it, was in the bank's possession;

11 Third, that the defendant Croft and the other
12 man took the money by force and violence or by
13 intimidating the bank employees;

14 Fourth, that the deposits of the bank were
15 at the time insured by the Federal Deposit Insurance
16 Corporation; and

17 Fifth, that the defendant participated in the
18 bank robbery in that, knowing that the defendant Croft
19 and the other man had just committed the bank robbery,
20 he intentionally helped them to escape capture.

21 If the Government approves each of these five
22 essential elements beyond a reasonable doubt, you
23 will convict the defendant on Count one. If the
24 Government fails to prove any one or more or all of
25 the essential elements of Count one beyond a reasonable

Charge

21
2 doubt, then you must acquit the defendant on Count
3 one.

4 The indictment alleges that the defendants
5 took the money from the person or presence of another
6 person. The Government does not have to show that
7 the defendant Croft and the other man snatched the
8 money from the hand or presence of another person.
9 It is enough if it shows that the defendant Croft and
10 the other man got the money from the bank employees
11 or from their presence against their wills. If
12 you are satisfied that the employees handed over
13 the money or allowed it to be taken, that is neverthe-
14 less a taking if the employee handed the money over or
15 allowed it to be taken because they saw no practical
16 alternative to doing that at the time.

17 The statute requires and count one of the
18 indictment charges that the money taken was in the
19 custody or possession of the bank at the time of the
20 taking. That is sufficiently proved if the Government
21 establishes beyond a reasonable doubt that the money
22 taken was properly in the bank in the usual course of
23 bank business and was part of the money that the bank
24 employees were handling in the ordinary course of their
25 work of receiving deposits, cashing checks and so

Charge

1
2 forth.

3 The statute requires and Count one charges
4 that the defendants used force, violence and intimidat-
5 tion. The Government need not show that the defendant
6 Croft and the other man used all three. It is enough
7 if the Government establishes beyond a reasonable
8 doubt that the defendant Croft and the other man used
9 intimidation to get the money from the bank employees
10 or from their presence. What the Government must
11 show here is that the defendant Croft and the other
12 man used words and performed acts which would produce
13 in the ordinary person in the position of the bank
14 employees a fear of bodily harm and that the defendant
15 Croft and the other man did that intentionally in order
16 to get the employees to do what they wanted them to
17 do, that is to pass the money over to them or to let
18 them take the money. The test here is the nature of
19 the activities of the defendant Croft and the other
20 man, that is, the kind of words used and the sort
21 of actions taken. They must be shown to be such as
22 would induce fear in the mind of the ordinary person.
23 It would not be enough if you conclude only that
24 because the employees, were excessively timid or were
25 mistaken in their impressions, they failed fear

1 where persons of ordinary temperament would not have
2 been put in fear.

3 Now notice while the Government showed that
4 the Federal Deposit Insurance Company insured the
5 bank's deposits, it does not have to show that the
6 defendants knew that.

7 Finally, if you have concluded that the Govern-
8 ment has established the first four essential elements
9 beyond a reasonable doubt, then you can consider the
10 fifth essential element, that is, whether the defendant
11 participated in the bank robbery in that he aided and
12 abetted the commission of the bank robbery by furnishing
13 and driving the car to which the defendant Croft and
14 the other man switched. The defendant cannot be
15 convicted unless he knew that defendant Croft and
16 the other man had just committed a bank robbery, and
17 knowing that he intentionally helped them to escape
18 capture.

19 Let us repeat the essential elements of Count
20 one. The essential elements of Count one of the
21 indictment, all of which the Government proved beyond
22 a reasonable doubt or else you must acquit the defendant
23 on Count one are the following:

24 First, that the defendant Croft and another man
25 took money from the bank employees or from their presence;

51 Second, that the money, when the defendant
2 Croft and the other man took it, was in the bank's
3 possession;

4 Third, that the defendant Croft and the other
5 man took the money by force and violence, or by
6 intimidating the bank employees;

7 Fourth, that the deposits of the bank were, at
8 the time, insured by the Federal Deposit Insurance
9 Corporation; and,

10 Fifth, that the defendant participated in the
11 bank robbery in that, knowing that the defendant Croft
12 and the other man had robbed the bank, he intentionally
13 helped them to escape capture.

14 If the Government proves each of these five
15 essential elements of Count one beyond a reasonable
16 doubt, you will convict the defendant on Count one.
17 If the Government fails to prove any one or more or
18 all of the essential elements of Count one beyond a
19 reasonable doubt, then you must acquit the defendant
20 on Count one.

21 The essential elements of Count two are exactly
22 the same as those of Count one, plus the element of
23 assault or putting life in jeopardy by use of a
24 dangerous weapon. So as I have said, you do not
25 reach Count two at all unless you are satisfied

Charge

that the Government has proved all the elements of Count one.

What are the essential elements of Count two?

The essential elements of Count two, all of which the Government's ^{must} prove beyond a reasonable doubt or else you must acquit the defendant on Count two, on the following:

First, that the defendant Croft and another man took money from the bank employees or from their presence:

Second, that the money, when the defendant Croft and the other man took it, was in the bank's possession:

Third, that the defendant Croft, and the other man took the money by force and violence, or by intimidating the bank employees;

Fourth, that the deposits of the bank were of the kind insured by the Federal Deposit Insurance Corporation:

Fifth -- and this is the additional element -- that the defendant Croft and the other man assaulted or placed in jeopardy the life of one or more of the bank employees; or other persons then in the bank by use of a dangerous weapon in carrying out

Charge

the robbery and

Sixth, that the defendant participated in the armed bank robbery in that knowing the defendant Croft and the other man had just committed a bank robbery and had used a dangerous weapon to assault or jeopardize the lives of those in the bank, the defendant intentionally helped them to escape capture.

If the Government approves each of these essential elements of Count two beyond a reasonable doubt, you will convict the defendant on Count two. If the Government fails to prove any one or more or all of the essential elements of Count one beyond a reasonable doubt, then you must acquit the defendant on Count two.

I have already explained each of the elements that are in both counts, one and two. The additional element in Count two is the charge that the defendant Croft and the other man assaulted and placed in jeopardy the lives of persons in the bank by using a dangerous weapon. That requires proof beyond a reasonable doubt that in the perpetration of the alleged robbery a weapon capable of inflicting a fatal injury was used, and it was used against someone or more of the persons in the bank in such a manner and at such

8 1 distance that the person or persons against whom it
2 was used ran a real risk of being killed by the
3 weapon.

4 The Government need not prove that the
5 defendants intended actually to use the weapon if they
6 met resistance. To establish the defendant's guilt
7 under Count two, the Government however ^{must} show beyond
8 a reasonable doubt that the weapon was used as a means
9 to committing the alleged robbery; that it was an
10 operable weapon and that if it was so used against
11 one or more persons that it could have inflicted fatal
12 injury.

13 I should add this word of explanation. The
14 five essential elements of Count one, now, as I said
15 earlier, ^{are} also the first five of the six essential
16 elements of Count two. That is one cannot be guilty
17 of Count two, without also being guilty of Count one.
18 But if there was no assault or placing life in
19 jeopardy by use of a dangerous weapon, there can be
20 no conviction on Count 2. The offense charged in
21 Count one is just what it's called ^{is} and included
22 offense within Count two. However, you are asked
23 to return a verdict on both counts, Count one and
24 Count two. If you were to find the defendant guilty
25 on both counts, one and two, there could not be any

1 double sentence. The sentence would in substance
2 then be imposed only on Count two.

3 The essential elements of Count three of the
4 indictment, all of which the Government ^{must prove} approved --
5 I am sorry, I got ahead of myself.

6 Now, I must emphasize to you that to be an aider
7 or abettor in the commission of a crime, a person
8 must know that he is helping to commit a crime. If
9 a person is unaware that a crime is being perpetra-
10 ted, and innocently does something which helps the
11 perpetrator of a crime to complete the commission of
12 an offense, he is not a guilty aider or abettor,
13 since he does not have the required knowledge that
14 a crime is being committed.

15 However, in determining whether a person is
16 ^{innocently} intentionally helping or guiltily aiding and abetting
17 in the commission of a crime, you must take into
18 account all the evidence of the events and all the
19 circumstances of the person's acts and determine
20 from them whether you are or are not satisfied beyond
21 a reasonable doubt that the person charged as an aider
22 and abettor, or as a conspirator, did know that he was
23 participating in the commission of a crime.

24 The third count charges that the defendant
25 conspired to commit the bank robbery. The count is

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Charge

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drawn under 18 United States Code Section 371, which
in material part provides:

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"If two or more persons so conspired to commit
any offense against the United States, and one or
more of such persons do any act to effect the object
of the conspiracy, each shall be fined or imprisoned
or both."

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Count three reads in the following language:

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"On or about the 20th day of July 1976, within the
Eastern District of New York, the defendants Philip
Floyd Tolliver and Bill Croft, did combine, conspire,
confederate and agree together to commit an offense
against the United States in violation of Title 18
United States Code Sections 2113(a), 2,113(d), and
two by conferring together to rob by force, violence
and intimidation, and with a dangerous weapon, the
Marine Midland Tinker National Bank 1995 New Highway
East Farmingdale, New York, the deposit of which
were then and there insured by the Federal Deposit
Insurance Corporation.

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In furtherance of the said conspiracy and
in order to effectuate the purposes thereof, there
was committed there the following overt act:

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On or about the 23th day of July, 1976, within

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Charge

the Eastern District of New York, the defendant Philip Floyd Tolliver and Bill Croft rode together in a white 1973 Cadillac, bearing a New York license plate number 180BMR.

The charge of Count three turns on the word "conspiracy." What then is a "Conspiracy"?

Well, conspiracy is an offense separate from the commission of any offenses that may have been committed pursuant to the conspiracy. ~~Thus the~~ ^{That is} because for the formation of a conspiracy, of a partnership in criminal purposes, is in and of itself pronounced a crime by the statute. A conspiracy is a combination or agreement of two or more persons to accomplish an unlawful purpose by their concerted actions. The essence of the charge of conspiracy is:

First, an understanding among two or more persons that they will act together to accomplish a common objective, which they knew is unlawful, plus, paragraph second, the doing of an overt act in furtherance of the conspiracy. The understanding does not have to be a formal or expressed one. The understanding essential to the finding of a conspiracy exists if by whatever means, tacit or outspoken,

Charge

1
2 the alleged members of the alleged conspiracy have
3 arranged to unite their several efforts to accomplish
4 a common object that they know is unlawful.

5 Before you may find that a defendant or
6 any other person has become a member of a conspiracy,
7 the evidence in the case must show beyond a reasonable
8 doubt that the conspiracy was formed and the defendant
9 or other person who has claimed to have become a
10 member, helped to carry the plan forward knowing
11 the principle terms of the plan and that it was un-
12 lawful and having the intent to advance or further
13 some object of the conspiracy.

14 The overt act required to be proved may be
15 an act which considered by itself is an innocent act.
16 The overt act must be the overt act alleged in the
17 indictment, and it must be committed with the
18 conscious purpose of furthering the achievement of
19 the objective of the conspiracy.

20 The essential elements of Count three of the
21 indictment, all of which the Government must prove
22 beyond a reasonable doubt, or else you must acquit
23 the defendant on the following:

24 First, did the defendant conspire with
25 defendant Croft to rob by force or violence, or intima

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Charge

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tion and with a dangerous weapon, the Marine Midland

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Tinker National Bank in East Farmingdale; and paragraph

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second, the defendant on July 20th, 1976, drive with

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defendant Croft in a white 1973 Cadillac, with the

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conscious purpose of carrying to completion the

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conspiracy to rob the bank.

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(continued next page)

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2 THE COURT: (Cont'd.) If the Government
3 proves each of these two essential elements of the
4 conspiracy beyond a reasonable doubt, then you will
5 convict the defendant on Count 3. If the
6 Government fails to prove either or both of the
7 essential elements beyond a reasonable doubt, then
8 you must acquit the defendant on Count 3.

9 There is no charge that there were any
10 conspirators other than defendants Tolliver and
11 Croft. Hence, there can be no conviction of the
12 defendant on Count 3 unless you find that the
13 Government has shown beyond a reasonable doubt that
14 defendant conspired with defendant Croft and that
15 both drove in the Cadillac on the day of the bank
16 robbery for the purpose of carrying out the
17 conspiracy to rob the bank.

18 Proof beyond a reasonable doubt is not proof to
19 an absolute certainty. Few things in life can be
20 so proved. Proof beyond a reasonable doubt is such
21 proof as you would be willing to rely and act upon
22 in the most important of your own affairs.

23 If after weighing all the evidence, you
24 have an abiding conviction of the truth of the
25 charge, such that you feel conscientiously bound

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2 to act upon it, then you would be free from
3 reasonable doubt.

4 If, however, after weighing all the evidence,
5 you have such a doubt as would cause prudent persons
6 to hesitate before acting in matters of importance
7 to themselves, such a doubt would be a reasonable
8 doubt.

9 That does not mean that each bit of the
10 Government's evidence must be found by you to be
11 true beyond a reasonable doubt. It means rather
12 that in sum total the Government's evidence must
13 satisfy you beyond a reasonable doubt as to each
14 element charged or you must acquit.

15 A reasonable doubt may arise not only from
16 the evidence produced, but also from the lack of
17 evidence, since the burden to prove is always on the
18 Government, a defendant has the right to rely on
19 the failure of the Government to prove any
20 essential element of the charge.

21 A defendant may rely, too, on evidence
22 brought out under cross-examination of witnesses
23 called by the Government.

24 The law does not impose on a defendant the
25 burden or duty of producing any evidence.

3 1
2 Under our law a defendant has a constitutional
3 right to remain silent, no inference unfavorable to
4 the defendant can be drawn from that fact. Your
5 deliberations, accordingly, must exclude consideration
6 of or reference to the matter and must concern
7 itself solely with the evidence before you.

8 A defendant is presumed to be innocent and
9 that presumption accompanies him throughout the
10 trial. It continues unless you are satisfied on
11 all the evidence that the Government has proved
12 defendant's guilt beyond a reasonable doubt.

13 I will not summarize the evidence. You
14 have heard eleven witnesses, to name them in the
15 order of which they testified: Ralph Parkhill,
16 Elayne Brown, Lisa Chiransky, Bernadino Galluppi,
17 Michael Lieblein, James Zima, Walter Ryan,
18 Eugene Smith, Kenneth H. Sooker, Lawrence T.
19 Sweeney and Dennis Imbesi..

20 Fourteen exhibits have been received in
21 evidence.

22 I have said that you must decide the case on
23 the evidence. The evidence is the testimony of
24 these witnesses and the exhibits received in
25 evidence.

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2 Statements and arguments of counsel and
3 answers stricken from the record are not evidence.

4 The evidence includes, of course, what is
5 brought out on cross-examination as well as what
6 is testified under direct examination.

7 Your verdict must be based on the evidence.
8 But in your consideration of the evidence you are
9 not limited to the bare words of the witnesses and
10 the bald facts that you find have been proved. The
11 evidence includes the inferences reasonably to be
12 drawn from the testimony which you hear and the
13 facts which you find have been proved.

14 There are two types of evidence from which
15 you may lawfully find that a fact has been proven.
16 One is direct evidence, such as the testimony of
17 an eyewitness to his observations of the facts to
18 be proved. The other is circumstantial evidence,
19 the proof of facts and circumstances which
20 rationally imply the existence or non-existence of
21 some other fact because such other fact usually
22 and reasonably follows according to the common
23 experience of mankind.

24 Thus, if you see people coming into a
25 building shaking out dripping umbrellas, and others,

1 about to go out-of-doors, turning back toward their
2 offices, you infer from these circumstances that it
3 is raining outside. Or, while you can see from
4 your window that the sky is full of clouds and
5 the streets are wet, you see also that passing cars
6 are not using their windshield wipers and passersby
7 are carrying their umbrellas folded under their
8 arms; you infer from those circumstances that it is
9 not raining.
10

11 As a general rule the law makes no distinction
12 between direct and circumstantial evidence. If the
13 evidence, as here, is in part indirect and
14 circumstantial, then you apply to it, along with
15 all the other evidence, the same standard of proof.
16 It must, taken with the other evidence, satisfy you
17 of the defendant's guilt, beyond a reasonable
18 doubt or else you must acquit.

19 You are the sole judges of the credibility
20 of the witnesses. The motives and state of mind
21 of each witness as they appear to you and the
22 circumstances and inducements under which the
23 witness testified are to be taken into account.
24 Consider any relation each witness may bear to
25 either side of the case and the manner in which

6 1 the verdict might affect him.
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3 You may consider the appearance and manner
4 of each witness on the witness stand, the witness's
5 apparent candor or lack of it, and the character
6 of the testimony given, whether the testimony
7 contains inconsistencies or discrepancies, whether
8 it is intrinsically credible or seems to you in
9 whole or part improbable, and whether it conflicts
10 with other testimony or is consistent with other
11 testimony in the case.

12 In weighing the effect of conflict or
13 discrepancy, consider whether it pertains to a
14 matter of importance or to unimportant details and
15 whether it seems to you to result from innocent
16 error or from falsehood.

17 If you find a witness has been mistaken or
18 untruthful, in all or in part of the testimony
19 given, then you may give the testimony of that
20 witness such credit, if any, as you think it
21 deserves in the light of the nature and extent of
22 the defects that you find in it.

23 Evidence that at an earlier time a witness
24 made a statement inconsistent with or contradictory
25 of that witness's testimony here in your presence

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2 justifies you in rejecting the testimony given
3 before you on that point but does not require you
4 to reject the testimony.

5 You must decide in the light of the
6 inconsistencies and all the other factors bearing on
7 the credibility of the testimony whether you do or
8 do not accept that as true. You do not, however,
9 take the earlier statement establishing the true
10 facts. Rather, you treat it as, at most, nullifying
11 the testimony given here in court.

12 If you conclude that a witness has knowingly
13 testified falsely concerning any material matter,
14 you have a right to distrust that witness's
15 testimony in other particulars. You may reject
16 all of the witness's testimony or give it or parts of
17 it the credence you think it deserves.

18 I have sought not to comment on the evidence
19 or to give any impression as to my own view, if I
20 have one, of the relative weight of the evidence.
21 If I have done so, however, you may disregard it
22 entirely for you are the sole judges of the
23 facts.

24 From time to time in the course of the
25 trial, objections have been made and rulings have

2 on evidence. Draw no inferences from the comparative
3 frequency of objections of one or the the other
4 side or from the comparative record in having
5 objections sustained. Where an objection to a
6 question has been sustained, disregard the question
7 and draw no inferences from its wording about the
8 answer that might have been given.

9 Where an objection is overruled, evidence
10 then received has no special weight just because
11 unsuccessfully an objection took place.

12 Your verdict must be unanimous.

13 It is your duty as jurors to consult with
14 one another and to deliberate with a view to
15 reaching agreement if you can do so without violence
16 to individual judgment. Each of you must decide
17 the case for yourself, but do so only after an
18 impartial consideration of the evidence with your
19 fellow jurors.

20 In the course of your deliberations do not
21 hesitate to reexamine your own views and change
22 your opinion if convinced it is erroneous.

23 Your task is one of conscience, and pride
24 of opinion has no place in matters of conscience.
25 But do not surrender your honest conviction as to

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2 the weight or effect of evidence solely because
3 of the opinion of your fellow jurors or for the
4 mere purpose of returning a verdict.

5 The form of your verdict, which must be
6 given separately on each count is simple. Your
7 verdict must be guilty or not guilty. It must be
8 given separately on each count and it must be a
9 unanimous verdict on each count.

10 Your verdict need not be the same on all
11 counts. Your verdict on each count will be
12 delivered orally here in open court by your Foreman
13 in response to questions which the Deputy Clerk
14 of the Court will address to him.

15 You are not partisans. You are judges,
16 judges of the facts. Your sole interest is to
17 ascertain the truth from the evidence in the case.

18 When you have reached a verdict and are
19 ready to report, simply advise the Marshal that
20 you have reached a verdict without disclosing orally
21 or in writing what your verdict is.

22 Your verdict must not be disclosed to anyone
23 before you deliver it orally in the courtroom in
24 response to the questions of the Clerk of the
25 Court.

1 If you wish to communicate with the Court,
2 do so in writing, using the Foreman, Juror No. 1,
3 as your intermediary and spokesman. Notify the
4 Marshal when you have any such communication.
5 The Marshal will be seated out here in the court-
6 room. If you have a message, you have to open the
7 soundproof door and knock on the courtroom. He
8 will open the door and take the message from you.
9

10 There will now be a short recess during
11 which counsel will review the charge with me to
12 make certain that nothing has been omitted or
13 misspoken. Then you will retire to the jury room
14 to deliberate your verdict.

15 When you come back into the jury room, would
16 the alternates, please, bring your hats and coats
17 with you because at this point you will be excused.

18 Don't start discussing it yet, because, as
19 you see, at the moment the two alternates are
20 strangers to your deliberations so that you should
21 not initiate them until after you are finally given
22 the case to decide.

23 (Jury leaves courtroom.)
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25 (Continued on next page.)

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THE COURT: Anything further?

MS. SELTZER: The only thing I want to ask is that you can advise the jury they can have testimony read back or the exhibits being brought in.

MR. ADLERSTEIN: I was going to ask that but I'll abide with your Honor's discretion.

THE COURT: I don't think we have any experienced jurors on the jury.

MR. ADLERSTEIN: I can't recall.

THE COURT: I know we had some among the 28.

MS. SELTZER: Your Honor, I think the exhibits Mr. London introduced are fairly duplicitous of the ones introduced by the Government.

THE COURT: They were not identified as such. They were in fact both blowups of the other one.

MR. ADLERSTEIN: Also they are immaterial as to the issues in the case right now. I think that --

THE COURT: In view of the line taken --

MR. ADLERSTEIN: They are harmless at this time.

THE COURT: Shall we give it to them now?

MS. SELTZER: Yes.

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MR. ADLEPSTEIN: Yes.

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(Jury enters courtroom.)

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THE COURT: There will be no additional charging material, ladies and gentlemen of the jury.

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You should know that if there are any exhibits that you want, just send for them, either a particular exhibit or all of them, whichever you prefer.

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If you want to know what certain testimony was, it has all been transcribed and just send a message in as to what testimony, if any, you wish to have reread to you.

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Are the Marshals here?

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THE CLERK: Yes.

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(The Marshal is sworn.)

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THE COURT: From now until you reach your verdict you're in the Marshal's custody. Strictly speaking I'm sure it's the first time you've ever been in custody. Now you know what it's like.

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You will now retire to consider your verdict.

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THE CLERK: The alternates will remain?

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THE COURT: Yes, alternates, please stay.

23

(Jury leaves courtroom.)

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THE COURT: All I can do is thank you very much for your patient attendance at this trial,

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1 alternate jurors.

2 You have to go down. You're still open for
3 another week of jury service.

4 MS. SELTZER: Can we go to lunch?

5 THE COURT: Is it agreeable to counsel on
6 both sides if the jury sends for the exhibits that
7 they be given to them without more ado?

8 MR. ADLERSTEIN: Yes.

9 MS. SELTZER: Yes.

10 MR. ADLERSTEIN: I'll hand over the Government
11 Exhibit to the Clerk.

12 THE COURT: If there are any messages as
13 long as they are shown to me and I see nothing suspi-
14 cious, I'll permit the Marshals to make the call
15 and if we have to appoint relief Marshals that
16 Mr. Walsh can do that in our absence.

17 MR. ADLERSTEIN: YOur Honor, I will leave the
18 exhibits on counsel table, is that all right?

19 THE COURT: Yes.

20 (Time noted 1:30p.m.)

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AFTERNOON SESSION

(Jury not Present.)

(Time noted: 2:20 p.m.)

THE CLERK: Jury note marked Court Exhibit No. 1.

(Whereupon, the Court recessed.)

(Whereupon, at 3:20 court resumed.)

(Jury not present.)

THE COURT: I think it is just Mr. Sweeney's testimony about his conversations with Mr. Tolliver?

MS. SELTZER: I would assume the testimony regarding Mr. Croft has been stricken. Are you going to advise them of that?

THE COURT: Yes.

(Jury enters box.)

THE COURT: Sorry for the delay, but we mislaid a lawyer and it took quite a while to locate the lawyer. We have your note requesting the testimony of FBI agents referring to Croft's and Tolliver's whereabouts before 9:00 a.m. on the day of the robbery and it is signed by your Foreman.

Now, neither Mr. Sooker or Mr. Sweeney were in touch with this situation until the stop at Route 109 and New Highway. That is the first time they had contact with them. So, they knew nothing about the whereabouts of Mr. Croft and Mr. Tolliver early in

1 that day. The only information that you have from
2 them was through their telling you what Mr. Tolliver
3 told Mr. Sweeney and what Mr. Croft told Mr. Sooker.

4 Now, what Mr. Croft told Mr. Sooker has been
5 stricken from the record. You remember, I asked you
6 to dismiss it from your minds because that just bound
7 him, in lawyers' language, and he's out of the case
8 now. That wasn't evidence against Mr. Tolliver to
9 any degree.

10 Now, Mr. Sweeney's testimony with respect to
11 his conversations with Mr. Tolliver on July 20th,
12 after they had reached the 1st Precinct stationhouse
13 in Suffolk County is given at, starting at page 582
14 of the transcript. First Mr. Sweeney was asked
15 whether or not he had given Mr. Tolliver his rights
16 and he said that he did.

17 (Whereupon, the Court read from the trial
18 transcript starting at page 582, line 17 to page 585,
19 line 17.)

20 THE COURT: Now, this is cross-examination.
21 I think it is page 590, starting at line 17.

22 (Whereupon, the Court read from the transcript
23 starting at page 590, line 17 to page 592, line 25.)

24 THE COURT: I think that is all. I think the
25 rest deals with another issue. That is all.

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(Whereupon, the jury returned to their deliberations at 3:35 p.m.)

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MS. SELTZER: The trouble with these questions, no one ever knows what they indicate. You can take a thousand guesses. There is no way of knowing.

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THE COURT: There is no way of knowing.

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(Whereupon, the Court recessed.)

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(Continued on next page.)

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(Time noted 4:55 P.M.)

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THE COURT: Question from the Jury is, "Does the verdict on count three require the same verdict on count one and two?"

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MS. SELTZER: Your Honor, it's my position that if there was a different verdict on count one and two than count three, it would be an inconsistent verdict.

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THE COURT: Yes?

MS. SELTZER: It seems to me the basic elements needed to prove the aiding and abetting charge are the same elements that are needed to prove the conspiracy and in substance there is no difference. It's a matter of words than anything else.

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MR. ADLERSTEIN: Your Honor spent a considerable period of time charging them with respect to each count.

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THE COURT: I said they have to decide them separately.

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MR. ADLERSTEIN: Yes. I believe that is so.

MS. SELTZER: And since the question has come down, I really didn't object at the time you charged them, I didn't focus on it at that time. Now I am focusing on it.

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THE COURT: Why do you say that? I believe it

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is so.

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MS. SELTZER: It seems to me in order for someone to join in a plan to commit an act, he is by its nature helping or aiding and abetting the commission of that act. To find on the one hand that he's guilty of one and on the other hand that he's not guilty of the other is inconsistent.

THE COURT: Aren't there a great many cases that say jurors can give mercy verdicts in which they do not follow through logically and bring in a verdict on every count that they logically could bring it in on? You see, I think the difficulty with the argument is there is really a situation, as in the Pinkerton case all over again, isn't it?

MS. SELTZER: I'm not sure what case you're referring to?

THE COURT: That is the one where you have a conspiracy. Then each substantive count is just an overt act under conspiracy and therefore you just put them together and you don't think clearly about it. It seems to me this is the same way, count one and two are quite distinct. It seems to me the Jury could well think that the fact that one is in on a plan from the beginning, it might not necessarily mean that you were

1 in on the plan for using guns.

2 MS. SELTZER: But at least with regard to count
3 one, especially with the factor of aiding and abetting,
4 it did not occur prior to but subsequent to the bank
5 robbery in the sense that the Government's proof --

6 THE COURT: No, you see, you could aid and abet
7 without having been part of the plan if all the infor-
8 mation necessary to get involved wasn't available to
9 you, but enough was there so that you knew who you were
10 aiding and abetting in the commission of a crime. Now,
11 the other way around is the harder one. How can you
12 conspire to commit and not aid in it? That is based
13 on the conspiratorial evidence without logically having
14 to have the same verdict on all three counts.

15 You see, the conspiracy means conspiracy. In
16 this case, it means conspiracy in advance, I would think.
17 Aiding and abetting doesn't have to be in advance.

18 MS. SELTZER: Except to the overt acts that are
19 alleged, this overt act of driving a car.

20 THE COURT: Yes, but that is the overt act. I
21 don't know, I think the only basis that you could say
22 to the Jury, and I think you can, is that they're not
23 required to convict on all three counts, but that is all
24 you can say. I mean logically, it is difficult to avoid
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count one and count three, I'm quite doubtful about it.

MS. SELTZER: I agree with that. Because of the violence that is required in count two.

THE COURT: Are they required to convict on all three? I don't think they are? What is the law? I think all I can say from this, I told them that they must consider each count separately and that if they find from the evidence the essential elements, then they will find the defendant guilty of that count. If they did not, they should not. Is the Government satisfied with that?

MS. SELTZER: Would you say that again?

THE COURT: Just what I said. They should consider each count separately on the evidence that applies to it and if they find that the evidence establishes the essential elements of each count beyond a reasonable doubt, then they should bring in a verdict of guilty. If they find those essential elements have not been proved beyond a reasonable doubt, they must acquit.

MS. SELTZER: Fine, your Honor.

THE CLERK: Jury note mark Court Exhibit 2.

(Whereupon, the Jury returned from their deliberations at 5:00 P.M.)

1
2 THE COURT: We have your message; "Does the
3 verdict on count three require the same verdict on
4 count one and two." Well, I instructed you that you
5 should consider each count separately and return a
6 separate verdict on each count and that the verdicts on
7 the three counts do not have to be the same.

8 What you should do is to see if you're satisfied
9 that the Government has, with respect to each count,
10 established the essential elements of that count
11 beyond a reasonable doubt. If you find that the
12 Government has done so, then you will bring in a verdict
13 of guilty on that count. If you find that it has not
14 established each essential element of the count,
15 beyond a reasonable doubt, then you must acquit and
16 that is true as to each count.

17 Now, I'm not sure that answers your question?

18 MR. FOREMAN: Yes.

19 THE COURT: You may return to your deliberations.

20 (Whereupon the Jury returned to their delibera-
21 tions at 5:03 P.M.)

22 (Whereupon the Court recessed.)

23 (Whereupon the Court resumed.)

24 (Time noted 5:30 P.M.)

25 (Jury not present.)

D

CLOSED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FILED
IN CLERK'S OFFICE
J. S. DISTRICT COURT E.D. N.Y.

N' FILMED

★ APR 21 1977 ★
TIME A.M.
P.M.

UNITED STATES OF AMERICA,

-against-

PHILIP FLOYD TOLLIVER,
Petitioner-Defendant. :

JUDGMENT

76-CR-472
77-C -607

----- X

A memorandum and order of Honorable John F. Dooling, Jr.,
United States District Judge, having been filed on April 20,
1977, denying petitioner's motion under 28 U.S.C., Sec. 2255,
it is

ORDERED and ADJUDGED that petitioner take nothing of
the respondent and that the motion under 28 U.S.C., Sec. 2255
is denied.

Dated: Brooklyn, N.Y.
April 21, 1977

Lewis Orgel
Clerk

(Tolliver Memorandum)

4/20

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA,

76 CR 472

77 C 607-

-against-

MEMORANDUM

PHILIP FLOYD TOLLIVER,

and

ORDER

Petitioner-Defendant.

-----X

Appearances:

LEE ADLERSTEIN, Esq. (DAVID G. TRAGER, Esq.,
United States Attorney, of Counsel) for
the Government

DANIEL J. BROOKS, Esq., for petitioner-defendant.

DOOLING, D.J.

Petitioner-defendant challenges, by motion under 28 U.S.C. 2255, the validity of his conviction on the ground that his defense counsel failed to present the testimony of his co-defendant, Billy Croft, which, he asserts, would have exculpated petitioner. Petitioner's application is based on two affidavits signed by Billy Croft. One affidavit asserted that by pre-arrangement petitioner did meet Croft and his companion, "Tex," on Central Avenue, East Farmingdale, soon after the bank robbery, and that Croft and "Tex" had there transferred from the automobile they had used in the robbery to petitioner's Cadillac, but that petitioner did not know that Croft and "Tex" had robbed the bank. The other affidavit asserted that after Croft entered

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his plea of guilty during trial his own counsel and petitioner's counsel told him in effect, that his pleading guilty would very likely result in petitioner's being acquitted, and that he should leave the court and not return. (Croft had been admitted to bail and was not remanded when he entered his plea of guilty.) Petitioner asserts that his counsel's failure to call Croft as a witness and his counsel's failure to move for a mistrial when Croft pleaded guilty or at some later point, and his counsel's failure to cross-examine a principal government witness on his failure to identify petitioner at his first viewing of a line-up which included petitioner (Tr. 228-231, 178, 180, 182, 184-185) amounted to a denial of effective assistance of counsel.

The testimony of Croft's counsel and of petitioner's counsel contradicts Croft's affidavit and his testimony. Croft's counsel testified that he did not express the view that Croft's guilty plea would clear petitioner, and did not tell Croft to stay away from the court house. He did recall that in discussing plea with the Assistant United States Attorney it was indicated that if Croft "cooperated" that would be brought to the attention of the sentencing judge. Croft's counsel understood the Assistant to mean

by "cooperation" that Croft would have to identify the man who entered the bank with Croft. Croft was unwilling to do that - not impossibly he was unable to identify him adequately. Croft's counsel had an imperfect recollection that the matter of Croft's testifying for the Government may have been raised, but that in any event the Government's interest was in apprehending the man who entered the bank with Croft and not in getting Croft's testimony. Special Agent Lawrence T. Sweeney was present at the conversations. As he recalled, Croft's counsel offered a plea under 18 U.S.C. § 2113(a) rather than Section 2113(d), and the Assistant indicated that he would agree only if Croft "gave" the Government the man who entered the bank with Croft; on the next day, as Sweeney recalled it, Croft's counsel reported that Croft had said he was afraid to "give" the third man, afraid of the third man and of petitioner; Sweeney recalled that the Assistant had said that he would not insist on Croft's testifying against petitioner.

Petitioner's counsel, who has been with the Legal Aid Society since 1969 and assigned to the Unit in this court since 1972, has no recollection of any discussion, either before or after Croft entered his plea, with Croft, or with Croft's counsel, or with petitioner about Croft's

testifying for petitioner, or of any recommendation that Croft stay away from the court house after he entered his plea, or of any statement that Croft's plea would clear petitioner. Petitioner's counsel testified that throughout the trial and until the verdict was rendered petitioner had insisted that he was not at the Central Avenue "switch," but, as he had said in his post-arrest statement to Agent Sweeney, was with Croft at other places. The evidence of the switch of two men from a green Pontiac to a white Cadillac on Central Avenue shortly after the robbery was irrefragable, the license plate registration numbers of both cars had been observed - that of the Pontiac at the bank and that of the Cadillac at the "switch" point - both had been promptly given to the police, and Croft and petitioner were arrested in the white Cadillac (registered to petitioner's wife) well within an hour of the robbery. The judgment of petitioner's counsel evidently was that it would be better to emphasize the certainty that petitioner had not entered the bank and the supposed slenderness of the inference that he had guilty knowledge of the bank robbery; counsel emphasized that, in contrast to Croft's arrival at the supposed rendezvous at breakneck speed, petitioner had driven off in his car with Croft and his companion at an ordinary speed. The testimony of peti-

petitioner's counsel, in some part retrospective, was that petitioner stood the best chance of acquittal at a trial in which Croft was also a defendant, one whose manifest guilt could help to underline the purely circumstantial nature of the case against petitioner. Surprisingly, the Assistant United States Attorney's closing argument ignored petitioner's allegedly false exculpatory statement given to Special Agent Sweeney and the discrepancies between Croft's and petitioner's exculpatory statements, and argued, essentially, that the rendezvous on Central Avenue admitted of no rational explanation except petitioner's guilty complicity. The Assistant's reply to petitioner's closing argument again disdained reference to either or both false exculpatory statements. The Assistant may well have thought it wise not to emphasize that petitioner had asserted his innocence from the start, and not to choose a confusing area of argument over the clarity of the circumstantial evidence presentation.

Croft's testimony was that he had known petitioner for many years, and that, very early on the morning of the bank robbery, he had sought petitioner out at an all-night card game, and tried to borrow petitioner's car, telling petitioner that he had to return another car that he had borrowed and needed petitioner's to replace it. Croft testified that petitioner declined to lend his car but

agreed to meet Croft at around 9:15, and did meet Croft, but not at exactly the designated place. Croft says that he explained his haste at the "switch" point to petitioner as attributable to a fight that he had just had at the job site of a friend and to his fear that the police were after him. Croft testified that even when he saw the police cars closing in (after petitioner had dropped the third man off near Wyandanch) he did not tell petitioner the truth but asked petitioner to say, if questioned, that Croft and he had been gambling together all night.

Croft testified that "Tex", the third man who entered the bank with him, was his acquaintance, one of recent date, and a stranger to petitioner. "Tex," he said, had stolen the Pontiac used in the robbery while Croft had been unable to get a "switch" car and for that reason wanted to borrow petitioner's car.

Croft insisted, in his testimony, that his counsel and petitioner's counsel had said that he'd done petitioner a good turn by pleading guilty and that petitioner would win his case, and that his counsel had told him to stay away from the court house after he entered his plea. Croft did not say that petitioner's counsel asked him not to testify. Croft testified that petitioner had not before

or during the trial asked Croft to testify in petitioner's behalf. It does not appear that Croft offered to testify until after the convictions, when Croft saw petitioner in prison.

Petitioner's testimony about the morning of the robbery was in general agreement with Croft's. Petitioner said that he had not met "Tex," the third man, before that morning, and that he had not talked to "Tex" during the ride of the three toward Wyandanch.

Only after Croft had entered his guilty plea, perhaps only after petitioner's counsel had rested petitioner's defense, petitioner testified, did he state to his counsel that his statement to Special Agent Sweeney was untrue but that he was innocent and had lied only to protect Croft. Petitioner testified that he did not learn of the robbery until after the arrest.

Petitioner testified that he had not suggested to his counsel that Croft be called as a defense witness.

It must be concluded that the failure to call Croft as a defense witness was natural and expectable in the circumstances of the case and its trial, and did not represent any want of competency or diligence on the part of petitioner's counsel. Petitioner's counsel had no fair

basis for believing that Croft could be a helpful witness. Croft did not offer to testify, and, since he had entered a plea of guilty, it was to be expected that if he was a witness, he would be a witness on the Government's rebuttal case. While the matter of Croft's being a defense witness was never really in the case, it is to be noted that if Croft had testified, petitioner could hardly have stayed off the witness stand, and he had one bank robbery conviction which might have been offered to impeach his credibility.

Special Agent Sweeney testified that he spoke to Croft several times after Croft's guilty plea was taken. On one occasion Croft told Sweeney that he could not speak out against the third man or petitioner because he was fearful for his family. A window in his wife's house, he said, had been blown out by a shot-gun blast, and Croft told Sweeney that he interpreted that as a warning to him. On another occasion Croft told Sweeney that the third man, "Tex", had been introduced to him by petitioner and petitioner had told Croft that "Tex" came from the South and was variously known as "Tex," "Slim" and "Booboo," or some such name.

It should be said that the testimony of Croft and

of petitioner on the points now directly in issue was not credible. Unless the application were viewed as one seeking a new trial on the ground of newly available evidence, there would be no reason to evaluate their testimony as it bears on the issue of petitioner's guilt; from that point of view, however, it cannot be said that the testimony of either or both men would have prevented a verdict of guilty.

It is

ORDERED that petitioner's motion under 28 U.S.C. 2255 for relief against the judgment of conviction entered December 17, 1976, is in all respects denied.

Brooklyn, New York

April 20, 1977.

U. S. D. J.

State of Pennsylvania
County of Union

ss:

Affidavit

Pilly Croft, upon his oath, deposes and says, that the following is a true account to the best of my knowledge and belief:

On July 20th, 1976 I was arrested along with Phillip Floyd Tolliver and charged with bank robbery. On September 27th, 1976 we both proceeded to trial on said charge as co-defendants. On the third day of trial, I decided upon advice of my attorney Mr. London, to retract my plea and enter a plea of guilty (Mr. Tolliver continued on with the trial).

After entering my plea of guilty I was told by Ms. Seltzer, attorney for Mr. Tolliver and Mr. London, my own attorney that my actions i.e., pleading guilty would be sufficient to clear Mr. Tolliver of all charges, and that I should stay away from the courtroom. I realize now that what I was told at that time was not correct -- Mr. Tolliver was convicted. I further realize that my testimony would have been quite vital to Mr. Tolliver's defense, however it was my interpretation of the advice given to me by Ms. Seltzer and Mr. London at that time, that it would not be necessary for me to testify and that I shouldn't.

In view of all I have related concerning this matter, I hereby wish to make it known that I was willing in the past, am willing at present, and would be willing at any ~~time~~ date and time in the future to testify in behalf of Mr. Phillip Tolliver.

Pilly Croft

2-4-77

WMB Cooksey

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statement of Facts

In the early morning hours of July 20th 1976, I located Mr. Tolliver at a card game in Wyandanch N.Y. as he had loaned me his automobile on many occasions prior, I again asked him for the loan of his automobile. He related to me that he had use for his automobile himself later in that same ~~day~~ morning and he couldn't loan it to me. I then asked him to do me a favor and pick me up later in East Farmingdale between 9:am and 9:15am. I told him to wait for me by the cemetery at Central Ave. and Pinelawn Road, as I must return the car that I was driving to another friends job located near there.

On the morning of July 20th 1976 I Billy Croft and another man known only to me as "Tex", did rob the Midland Marine Tinker Bank. We then drove to where I had asked Mr. Tolliver to meet me. We had discarded our masks, gloves, weapons, and money in a large paper bag. We got out of the other car and entered Mr. Tolliver's car. He asked me, "what's wrong Billy?" I told him that I had gotten into a fight with my friends (the other car owner) foreman on his job, I said I thought that he might have called the police. I then asked Mr. Tolliver to drop off Tex in Wyandanch by the schoolhouse which he did. We then proceeded toward Amityville N.Y. where we both lived at that time and was subsequently stopped by the Suffolk County Police Dept. ~~which~~ and then arrested some time later for bank robbery.

Mr. Tolliver had absolutely no knowledge what-so-ever as to what indeed did happen that day with regard to the bank robbery which had occurred earlier.

Billy Croft

2-4-77

MB Croft